behalf of the particular seller or non-profit organization;

(2) the prohibition on abandoned (and recorded) calls, 16 C.F.R. 310.4(b)(1)(iv), which requires the telemarketer to connect each call to a representative within two seconds of the recipient's completed greeting;

(3) the prohibition on placing calls before 8 a.m. or after 9 p.m., 16 C.F.R. 310.4(c);

(4) the requirement that telemarketers transmit caller identification information, 16 C.F.R. 310.4(a)(7); and

(5) a requirement that telefunders promptly indicate that the purpose of the call is to solicit charitable contributions and identify the charity on behalf of whom they are soliciting, 16 C.F.R. 310.4(e).

b. The Commission's authority under the Telemarketing Act overlaps with authority provided to the Federal Communications Commission (FCC) under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. 227. Among other things, the TCPA directs the FCC to issue rules addressing "the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object," 47 U.S.C. 227(c)(1), and also prohibits most prerecorded calls to residential phone lines with a few exceptions, 47 U.S.C. 227(b)(1)(B). The definition of "telephone solicitation" under the TCPA specifically exempts calls "by a tax exempt nonprofit organization." 47 U.S.C. 227(a)(3).

In July 2003, the FCC issued revised TCPA rules that are nearly identical to the Commission's TSR, including the "do-not-call" requirements, the abandoned call provisions, the time restrictions, and the disclosure and

caller identification provisions. See *In re Rules and Regulations Implementing the TCPA (In re TCPA)*, 18 F.C.C.R. 14,014 (2003). The FCC's amended rule subjects all commercial entities to its requirements, including for-profit entities exempt from the FTC's jurisdiction. *In re TCPA*, 18 F.C.C.R. 18,558, 18,560 (2003). The FCC retained regulatory provisions, however, that exempt from coverage solicitations by both non-profit organizations themselves and their for-profit telefunders. 68 Fed. Reg. at 44,161.

2. Petitioners National Federation of the Blind and Special Olympics Maryland, Inc., are both tax-exempt non-profit organizations that hire telefunders to solicit charitable contributions for them. Pet. App. 49a. In April 2003, petitioners filed suit for declaratory and injunctive relief against the FTC in the United States District Court for the District of Maryland. As relevant here, petitioners contended that the five provisions of the amended TSR described above, pp. 4-5, *supra*, violate the First Amendment to the Constitution. Pet. App. 8a, 49a.

The district court granted the Commission's motion for summary judgment. Pet. App. 43a-70a. The court held, *inter alia*, that the modest restrictions imposed by the TSR comport fully with the First Amendment. *Id.* at 55a-68a.

The court of appeals affirmed the district court's judgment. Pet. App. 2a-42a. The court held that the TSR does not violate the First Amendment because it is a "reasonable regulation" that is "narrowly drawn" to serve "sufficiently strong subordinating interest[s] that the [government] is entitled to protect"—namely preventing fraud and protecting home privacy. Pet. App. 3a (quoting *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 960-961 (1984)). Analyzing each of the

challenged TSR provisions in turn (Pet. App. 15a-23a), the court concluded that they are the "most reasonable and minor restrictions on telemarketing practices." *Id.* at 20a. For example, the court held that the charity-specific do-not-call provision is narrowly tailored because "it restricts only calls that are targeted at unwilling recipients," and it requires recipients to object to calls on a charity-by-charity basis. *Id.* at 17a-18a (quoting *Mainstream Mktg. Servs., Inc.* v. *FTC*, 358 F.3d 1228, 1242 (10th Cir.), cert. denied, 543 U.S. 812 (2004)). The court distinguished the present case from this Court's decisions in *Munson*, *supra*, *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1986), which held unconstitutional "blunt and broad" state laws that limited fundraising fees. Pet. App. 20a. The court of appeals explained that the laws invalidated in those cases were insufficiently tailored to prevent fraud, whereas the challenged TSR provisions "are carefully crafted" to prevent fraud and to protect privacy. *Id.* at 21a.

The court of appeals also rejected petitioners' argument that the TSR is unconstitutionally under-inclusive because it covers calls by telefunders but not direct solicitations by charities themselves. Pet. App. 23a-30a. The court concluded that the purported under-inclusiveness in the TSR "is justified by a neutral and legitimate reason"—the Commission's jurisdictional limitations. *Id.* at 24a; see *id.* at 26a-29a. The court reasoned that those jurisdictional boundaries do not raise any "red flag[s] indicating First Amendment problems," such as an attempt to favor one side of a public debate, the pursuit of an illegitimate government interest, or the failure genuinely to serve the interest that the challenged regulation is designed to advance. *Id.* at 28a.

The court noted that the "TSR provisions do not exhibit any disapproval of the content of the calls placed by telefunders. The TSR applies evenhandedly to solicitations for charities of all persuasions and beliefs. The restrictions apply to all telemarketing calls made by entities within the FTC's jurisdiction, regardless of the subject matter of the call or the viewpoint expressed by the caller." *Id.* at 32a. The court therefore concluded that the Rule is consistent with the First Amendment. *Id.* at 33a.

Judge Duncan dissented. Pet. App 34a-42a. Relying on *Riley*, *supra*, and *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993), she reasoned that the TSR is unconstitutionally under-inclusive because it covers telefunders but not in-house charity callers. Pet. App. 34a-37a. Unpersuaded that there is a legitimate justification for that distinction, she concluded that the Rule violates the First Amendment. *Id.* at 37a-42a.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. Although professional fundraising on behalf of charities enjoys some First Amendment protection, this Court has consistently held that speech "[s]oliciting financial support is undoubtedly subject to reasonable regulation." *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); see *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-796 (1988); *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 959-960 (1984). The government may impose content-neutral regulations on charitable fundraising if the regulations serve "sufficiently strong, subordi-

nating interest[s] that the [government] is entitled to protect" and are "narrowly drawn * * * to serve [the] interes[ts] without unnecessarily interfering with First Amendment freedoms." *Munson*, 467 U.S. at 960-961 (quoting *Schaumburg*, 444 U.S. at 636-637). The TSR provisions challenged by petitioners easily pass that test.[1]

Petitioners incorrectly assert (Pet. 16-18) that the TSR's restrictions are "substantial burdens" on speech. On the contrary, as the court of appeals explained, the Rule's provisions are narrowly tailored to further important governmental interests. Pet. App. 15a-23a. Most of the challenged provisions impose modest limitations on telemarketing calls in order to protect residential privacy, which this Court has recognized as an interest "of the highest order in a free and civilized society." *Frisby* v. *Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey* v.

---

[1] Petitioners incorrectly contend (Pet. 10) that the TSR is not content-neutral. In general, a regulation is content-neutral unless "the government has adopted [the] regulation because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). The TSR was clearly not adopted for such a purpose. As the court of appeals explained, "the TSR provisions do not exhibit any disapproval of the content of the calls placed by telefunders. The TSR applies evenhandedly to solicitations for charities of all persuasions and beliefs. The restrictions apply to all telemarketing calls made by entities within the FTC's jurisdiction, regardless of the subject matter of the call or the viewpoint expressed by the caller." Pet. App. 32a. Petitioners appear to argue that the TSR is not content-neutral based on the supposition that its restrictions are more likely to affect small or unpopular charities. Pet. 10-11. Petitioners provide no support for that supposition, but it is irrelevant in any event. As explained above, the TSR "serves purposes unrelated to the content of expression"—the protection of privacy and the prevention of fraud—and it is therefore "deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

Brown, 447 U.S. 455, 471 (1980)). For example, the prohibition on calls early in the morning or late at night enables families to enjoy a few uninterrupted hours at home but still permits a generous thirteen hours each day for solicitations. 16 C.F.R. 310.4(c). Similarly, the restriction on abandoned calls, 16 C.F.R. 310.4(b)(1)(iv), protects households from an intrusion that the Commission found, based on extensive public comment, to be particularly severe. Abandoned calls not only waste consumers' time but also frighten some consumers, who become concerned that they are being monitored by stalkers or burglars. 68 Fed. Reg. at 4641-4643.

Other provisions of the TSR simply give individual households the choice to restrict unwelcome solicitations. The entity-specific do-not-call provision enables consumers to indicate that they do not wish to receive additional calls on behalf of a particular charity. 16 C.F.R. 310.4(b)(1)(iii)(A). Similarly, the provision requiring telemarketers to transmit their caller identification information gives households the opportunity to screen solicitation calls and either accept or ignore the calls as they see fit. 16 C.F.R. 310.4(a)(7); see 68 Fed. Reg. at 4627. The Court has repeatedly approved regulations of this type, which allow individuals to opt in to limitations on speech, because they are a far more narrowly tailored means of protecting privacy than absolute prohibitions on speech. See *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 737-738 (1970) (upholding law permitting residents to bar mailings that they consider to be provocative); *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Village of Stratton*, 536 U.S. 150, 168-169 (2002) (recognizing validity of law permitting enforcement of "no solicitation" signs posted by residents); *United States* v. *Playboy Entm't Group, Inc.*,

529 U.S. 803, 815 (2000) (targeted blocking by consumer less restrictive than government ban on speech).

The fifth provision challenged by petitioners requires telefunders to identify the charity on whose behalf they are calling and the purpose of the call. 16 C.F.R. 310.4(e). As the court of appeals explained, that provision is narrowly tailored to further the government's substantial interest in preventing fraud. Pet. App. 19a. The required disclosures permit consumers to make informed decisions about their charitable donations, including whether to invoke the entity-specific do-not-call provision. See *Illinois* v. *Telemktg. Assocs., Inc.*, 538 U.S. 600, 623 (2003). This Court has upheld substantially broader disclosure requirements in order to prevent charitable solicitation fraud. See *Riley*, 487 U.S. at 799 n.11, 800 (professional fundraisers may be required to disclose their "professional status," and a State may publish their "detailed financial disclosure forms"); *Munson*, 467 U.S. at 961-962 n.9 (upholding law requiring charity to disclose its finances).[2]

---

[2] Petitioners incorrectly contend (Pet. 16, 17, 19) that the TSR can pass muster under the First Amendment only if it is "the least restrictive means" to further the government's interests. This Court has never imposed that level of scrutiny on laws regulating professional fundraising for charities. Instead, the Court has required only that the regulations be "narrowly drawn" to serve a "sufficiently strong, subordinating interest." *Munson*, 467 U.S. at 960-961 (quoting *Schaumburg*, 444 U.S. at 636-637). Cf. *Ward*, 491 U.S. at 797-799 & n.6 (rejecting assertion that narrow tailoring requirement mandates least-restrictive-means analysis of content-neutral time, place, and manner restrictions). In any event, the challenged TSR provisions satisfy the strict scrutiny advocated by petitioners. Protecting the privacy of the home and preventing fraud are compelling state interests, and the TSR's provisions directly advance those interests by imposing only the most minimal limitations on speech. Any less restrictive alternatives (such as

2. Petitioners mistakenly argue (Pet. 6-16, 18-19) that the TSR violates the First Amendment because it is under-inclusive. Petitioners' primary complaint is that the TSR covers telefunders but not solicitation calls made directly by charities themselves. As the court of appeals explained, however, that limitation on the scope of the TSR is "justified by a neutral and legitimate reason"—the FTC's limited jurisdiction. Pet. App. 24a; see *id.* at 26a-29a. And the limits on the FTC's jurisdiction present no First Amendment concerns. See *id.* at 32a.

"There is no mystery * * * about why the FTC has distinguished telefunders from in-house charity callers." Pet. App. 26a. The Commission has no jurisdiction over charitable organizations, and it therefore lacks authority to subject them to the TSR. See 68 Fed. Reg. at 4586-4587. At the same time, in the USA PATRIOT Act, Congress unambiguously directed the FTC to use the authority that it does possess to prevent abusive charitable solicitations. See 15 U.S.C. 6106(4) (2000 & Supp. II 2002). The FTC therefore included for-profit telefunders within the coverage of the TSR, just as the FTC included other for-profit entities that are subject to its jurisdiction. 68 Fed. Reg. at 4585. The FTC's decision to regulate all entities over which it has jurisdiction, but only those entities, does not reflect discrimination against any category of speech or group of speakers. On the contrary, the FTC's jurisdictional constraints provide a "neutral justification" for the scope of the TSR. Pet. App. 28a (quoting *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 429-430 (1993)).

Petitioners contend (Pet. 12, 15-16) that the First Amendment does not permit Congress to subject

---

permitting late night calls or calls from persons who refuse to identify themselves) would leave consumers vulnerable to abuse or fraud.

telefunders to the telemarketing protections of the TSR unless it also expands the FTC's jurisdiction to cover in-house charity callers. But it is perfectly reasonable for Congress to distinguish between solicitations by professional fundraisers and solicitations by charities themselves. That distinction reflects the common-sense judgment that for-profit solicitors are more likely to engage in abusive or coercive telemarketing behavior because their compensation depends on the level of contributions they solicit. Several courts have recognized the validity of that judgment in upholding solicitation laws that exempt in-house charity callers. See *Fraternal Order of Police, N.D. State Lodge* v. *Stenehjem*, 431 F.3d 591, 598 (8th Cir. 2005) (deferring to legislative judgment "that professional charitable solicitors intrude more regularly on residents' privacy than [the charity's] volunteers or employees"), petition for cert. pending, No. 05-1149 (filed Mar. 6, 2006); *National Coalition of Prayer, Inc.* v. *Carter*, No. 02-0536-C B/S, 2005 WL 2253601, at *12-*13 (S.D. Ind. Sept. 2, 2005) (same), appeal docketed, No. 05-3995 (7th Cir. Oct. 14, 2005); *Special Programs, Inc.* v. *Courter*, 923 F. Supp. 851, 860 (E.D. Va. 1996) (same); *Lucas* v. *Curran*, 856 F. Supp. 260, 273 (D. Md. 1994) (same).

This Court has also recognized that the government may impose narrowly tailored restrictions on telefunders without imposing those restrictions on charities. As noted above, in *Riley*, the Court expressly approved laws that required fundraisers to disclose their "professional status" and provided for publication of the amount of money that the fundraisers turned over to the charities for which they solicited, because those laws are narrowly tailored to prevent telefunder fraud. *Riley*, 487 U.S. at 795, 799 n.11, 800.

There is thus no merit to petitioners' contention (Pet. 8-9, 12, 18-19) that this Court—in *Riley*, *Schaumburg*, and *Munson*—categorically rejected any connection between the paid status of a telefunder and fraud. Rather, in those cases, the Court struck down laws that presumed that solicitations were fraudulent based solely on the percentage of funds retained by the solicitor, because those laws only "peripherally promoted" the government's interest in preventing fraud. *Schaumburg*, 444 U.S. at 636; see *Riley*, 487 U.S. at 788-789; *Munson*, 467 U.S. at 966-967. At the same time, the Court recognized that the "interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation" imposed on professional fundraisers. *Riley*, 487 U.S. at 792.

Petitioners also err in contending that *Riley* holds that laws directed at telefunders but not charities themselves "'necessarily' discriminate against small or unpopular charities." Pet. 10-11; see Pet. 6. One of the laws held unconstitutional in *Riley* required professional fundraisers, during the solicitation and before the appeal for funds, to disclose the amount of money that they turned over in the previous year to the charities for which they solicited. The Court reasoned that this disclosure requirement would so prejudice "legitimate" fundraising efforts that it would "discriminate[]" against charities that hire professional fundraisers. 487 U.S. at 799. But the Court did not rule that *all* limitations directed only at professional fundraisers are discriminatory and unconstitutional. On the contrary, as noted above, the Court expressly approved several limitations of that kind because they were narrowly tailored to address legitimate governmental interests. See *id.* at 795, 799 n.11, 800. The TSR's modest strictures, including

the requirement that telefunders disclose the identity of the charity for which they are soliciting and the purpose of the call, are the sort of narrowly tailored regulations approved in *Riley*. See *id.* at 799 n.11.

Petitioners are also mistaken in asserting (Pet. 7, 9, 12, 19) that the decision below conflicts with *Discovery Network*. That case involved a city's ban on newsracks dispensing commercial handbills, but not newsracks dispensing newspapers, for the purported purpose of promoting esthetics and pubic safety. The Court struck down the ban, which covered approximately 4% of the city's newsracks, because it made only a "minute" or "paltry" contribution to the city's goals. 507 U.S. at 417-418. The Court also noted that the city proffered "no justification" for its distinction between commercial newsracks and newspaper racks other than a "naked assertion that commercial speech has 'low value.'" *Id.* at 429. In sharp contrast to the "paltry" manner in which the law at issue in *Discovery Network* furthered the government's asserted interests, the TSR's application to telefunders directly and significantly furthers the protection of privacy and the prevention of fraud by, for example, restricting early-morning and late-night calls, eliminating menacing hang-up calls, and requiring basic disclosures about the purpose of solicitations. Moreover, as discussed above, distinguishing between telefunders and in-house charity callers is entirely reasonable. See p. 13, *supra*.

3. Petitioners also object (Pet. 7, 14, 18-19) to other exemptions in the TSR that they contend render it impermissibly under-inclusive. There are, however, legitimate reasons for all of those exemptions. In each case, the entity or speech exempted from the TSR is either subject to another federal law protecting consum-

ers or does not pose the same risk of overreaching or harassment as calls by telefunders.

First, all commercial telemarketers that are not covered by the TSR are fully covered by the FCC's TCPA rules, which are virtually identical in all relevant respects to the TSR. See *In re TCPA*, 18 F.C.C.R. at 14,034; *id.* at 14,138-14,139. Similarly, intrastate calls are covered by the FCC's parallel TCPA rules. See 47 U.S.C. 152(b); *In re TCPA*, 18 F.C.C.R. at 14,028; *id.* at 14,138-14,139.

Second, the TSR does not cover political fundraising because political solicitations are neither commercial nor charitable telemarketing and therefore do not fall within the terms of the Telemarketing Act. See 15 U.S.C. 6106(4) (2000 & Supp. II 2002); 68 Fed. Reg. at 4589 & n.106. Laws regulating political speech pose unique First Amendment concerns. See *Burson* v. *Freeman*, 504 U.S. 191, 196 (1992); *Meyer* v. *Grant*, 486 U.S. 414, 425 (1988). Congress has therefore decided to regulate political fundraising under a separate regime, the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, administered by a separate agency, the Federal Election Commission, which has expertise in the area. That decision does not render the TSR constitutionally suspect.

Finally, Congress's decision not to regulate calls that do not solicit funds, such as education or advocacy calls, is also reasonable. Those calls do not pose the same concerns as fundraising calls. See *Hill* v. *Colorado*, 530 U.S. 703, 723-724 (2000) (upholding a statute against a charge of under-inclusiveness because the speech it permitted was not "similarly likely to raise the legitimate concerns to which [the statute] respond[ed]"); *United States* v. *Kokinda*, 497 U.S. 720 (1990) (upholding a reg-

ulation that restricted solicitations, but not other forms of expression).

4. Petitioners do not—and could not—contend that this Court's review is necessary to resolve any split of authority among the courts of appeals. The courts of appeals have consistently upheld the TSR, as well as analogous state charitable solicitation laws. Many of those state laws contain exemptions for in-house charity callers, political solicitations, and other types of speech or speakers similar to the exemptions in the TSR.

For example, the Eighth Circuit recently upheld a state do-not-call law that applies to charitable solicitations but exempts in-house charity callers, advocacy calls, political fundraising calls, and calls to persons with a prior business relationship. *Stenehjem*, 431 F.3d at 596-599; see also *National Fed'n of the Blind of Ark., Inc.* v. *Pryor*, 258 F.3d 851, 855 n.3, 857 (8th Cir. 2001) (upholding law that regulates charitable and commercial solicitations but not political solicitations or advocacy calls). Other courts of appeals have likewise upheld state laws restricting charitable solicitations or imposing disclosure requirements that contain similar exemptions from coverage. See *American Target Adver., Inc.* v. *Giani*, 199 F.3d 1241, 1248-1249 (10th Cir.) (upholding disclosure and other requirements imposed only on professional charitable fundraisers), cert. denied, 531 U.S. 811 (2000); *Dayton Area Visually Impaired Persons, Inc.* v. *Fisher*, 70 F.3d 1474, 1481-1482, 1485 (6th Cir. 1995) (upholding law requiring various disclosures by charitable fundraisers and containing various exemptions), cert. denied, 517 U.S. 1135 (1996); *Auburn Police Union* v. *Carpenter*, 8 F.3d 886, 901 (1st Cir. 1993) (upholding law prohibiting solicitations benefitting police officers and containing an exemption for campaign speech), cert. denied, 511 U.S. 1069 (1994).

Finally, the Tenth Circuit recently rejected a First Amendment challenge to the national TSR do-not-call registry, which, as noted above, applies to commercial but not charitable telemarketing. *Mainstream Mktg. Servs., Inc.* v. *FTC*, 358 F.3d 1228 (10th Cir.), cert. denied, 543 U.S. 812 (2004).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

MICHAEL D. BERGMAN
Attorney
Federal Trade Commission

APRIL 2006

Supreme Court, U.S.
FILED
MAY 5 - 2006
OFFICE OF THE CLERK

No. 05-927

IN THE

Supreme Court of the United States

NATIONAL FEDERATION OF THE BLIND;
SPECIAL OLYMPICS MARYLAND, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

ERROL COPILEVITZ
Counsel of Record
WILLIAM RANEY
COPILEVITZ & CANTER, LLC
423 W. 8th Street
Suite 400
Kansas City, Missouri 64105
(816) 472-9000

Attorneys for Petitioners

May 5, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
A. The Court Should Consider This Petition Concurrently With the Petition for a Writ of Certiorari Regarding *Fraternal Order of Police*	2
B. A Congressional Act Cannot Constitute "Neutral Justification" for the Abridgement of Free Speech	3
C. The FTC's Regulations are Content-Based Speech Restrictions	4
D. The FTC Admits the Absence of any Evidentiary Basis for the Fourth Circuit's Decision	5
E. The FTC Failed to Address the Equal Protection Argument	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	Page
Adarand Constructors v. Pena, 515 U.S. 200, 217 (1995)	8
City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993)	5
Fraternal Order of Police, et al. v. Stenehjem, 431 F.3d 591 (2005)	1-3
Mainstream Marketing Services, Inc. v. Federal Trade Commission, 358 F.3d 1228 (10th Cir. 2004)	3, 5
Riley v. National Federation of The Blind, 487 U.S. 781 (1988)	6
Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 476 U.S. 947 (1984)	6
Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)	5
United States v. Playboy Entertainment Group, Inc., 529 US. 803 (2000)	7
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	6
OTHER	
U.S. Constitution, First Amendment	3-4
U.S. Constitution, Fifth Amendment	8
U.S. Constitution, Fourteenth Amendment	8
15 U.S.C. § 41 *et seq.*	4
15 U.S.C. § 6105(a)	4

IN THE

Supreme Court of the United States

No. 05-927

NATIONAL FEDERATION OF THE BLIND;
SPECIAL OLYMPICS MARYLAND, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF

Pursuant to Supreme Court Rule 15, Petitioners National Federation of the Blind and Special Olympics Maryland, Inc. ("Petitioners") respectfully submit this "Reply Brief Supporting Petition for a Writ of Certiorari" to (A) request that the Court consider this Petition concurrently with the "Petition for a Writ of Certiorari" filed in the matter entitled *Fraternal Order of Police et al. v. Stenehjem*, 431 F.3d 591 (2005), Case No. 05-1149; and (B) address matters newly raised in the "Brief for the Federal Trade Commission in Opposition" (the "Opposition") filed on behalf of the Federal Trade Commission (the "FTC").

ARGUMENT

A. The Court Should Consider This Petition Concurrently With the Petition for a Writ of Certiorari Regarding *Fraternal Order of Police*.

In the Opposition, the FTC relies upon the recent decision of the Eighth Circuit in *Fraternal Order of Police et al. v. Stenehjem*, 431 F.3d 591 (2005). *See* Opposition p. 13 (citing *Fraternal Order of Police* for the proposition that "several courts have recognized the validity of that [common sense] judgment in upholding solicitation laws that exempt in-house charity callers") and p. 17 (noting that "the Eighth Circuit recently upheld a state do-not-call law that applies to charitable solicitations but exempts in-house charity callers, advocacy calls, political fundraising calls, and calls to persons with a prior business relationship.")

Both this case and *Fraternal Order of Police* involve the constitutionality of *charitable speech restrictions that apply to charities using professional fundraisers to solicit by telephone, but do not apply to charities using volunteer fundraisers to solicit by telephone.* In this case, the Fourth Circuit has upheld the application of certain provisions of the FTC's Telemarketing Sales Rule (including the entity specific do-not-call provision, calling time restrictions, a requirement that telefunders transmit caller-ID information and promptly identify the call as a solicitation, and a prohibition on abandoned calls) to charities using professional fundraisers. In *Fraternal Order of Police*, the Eighth Circuit has upheld the application the national do-not-call registry to charities using professional fundraisers in North Dakota. Charities using volunteer fundraisers are exempt from the charitable speech restrictions at issue in these cases.

Because these cases present similar issues, Petitioners request that the Petitions be considered together, and that review be granted in both cases.[1]

B. A Congressional Act Cannot Constitute "Neutral Justification" for the Abridgement of Free Speech.

In the Opposition, the FTC argues that its lack of jurisdiction over charities constitutes a "neutral justification" for its disparate treatment of charities using professional fundraisers, stating:

> 'There is no mystery . . . about why the FTC has distinguished telefunders from in-house charity callers.' [Citation.] The Commission has no jurisdiction over charitable organizations, and it therefore lacks authority to subject them to the TSR." *See* Opposition, p. 12.
>
> "On the contrary, the FTC's jurisdictional constraints provide a 'neutral justification' for the scope of the TSR." *See* Opposition, p. 12.

Absent an amendment to the Constitution, a federal agency's jurisdictional limitations cannot constitute a "neutral justification" justifying impairment of the freedom of speech under the First Amendment. The First Amendment expressly states: "*Congress shall make no law . . . abridging the*

---

[1] These cases exemplify the different regulations of charitable telephone solicitation being imposed by the FTC, FCC and various states. Reviewing courts are reaching inconsistent results. As pointed out by Amicus Veterans First, in upholding the constitutionality of the national do-not-call registry as applied to core commercial speech, the Tenth Circuit noted its exemption of all charitable solicitations. *See Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004). In *Fraternal Order of Police*, the Eighth Circuit recently upheld the application of the national do-not-call registry to charitable solicitations made by professional fundraisers in North Dakota. These different rulings refute the FTC's argument that "Petitioners do not—and could not—contend that this Court's review is necessary to resolve any split of authority among the courts of appeals." *See* Opposition, p. 17.

freedom of speech, or of the press. . . ." *See* United States Constitution, First Amendment.

The jurisdiction of a federal agency, including the FTC, is established by an Act of Congress. In the Opposition, p. 2, the FTC explains: "The FTC's jurisdiction under the Telemarketing Act is coextensive with its jurisdiction under the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq*. See 15 U.S.C. 6105(a). Its jurisdiction under the FTC Act excludes many non-profit entities. See 15 U.S.C. 44, 45(a)(2)."

If the FTC's jurisdictional limitations abridge a charity's rights under the First Amendment, they are unconstitutional. Moreover, permitting the FTC to use its jurisdiction as "neutral justification" for abridging speech is tantamount to arguing that *any Congressional Act can be a "neutral justification" justifying the abridgment of freedom of speech*. The First Amendment would be completely eviscerated by allowing a Congressional Act to serve as "neutral justification" justifying the abridgement of free speech.

C. The FTC's Regulations are Content-Based Speech Restrictions.

In the Opposition, the FTC argues that the challenged regulations are content-neutral because: "The restrictions apply to all telemarketing calls made by entities within the FTC's jurisdiction, regardless of the subject matter of the call or the viewpoint expressed by the called" (*see* Opposition, p. 8, and p. 9, n.1) and "the TSR 'serves purposes unrelated to the content of expression'—the protection of privacy and the prevention of fraud—and it is therefore 'deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" Opposition, p. 9, n.1.

These arguments miss the mark. The challenged regulations are content-based. Among other things, the underlying

definition of "telemarketing" contained in the TSR—"a plan, program or campaign which is conducted to induce . . . a charitable contribution . . ."— is so vague and overbroad that it gives the government virtually unfettered authority to determine, *based upon the content of the speech*, whether a call is "conducted to induce" a contribution. Based on the content of a call, the TSR requires the FTC to decide, for example, whether a series of calls only providing information and never mentioning a request for a contribution is actually conducted to "induce" a charitable contribution. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-153 (1969) (discussing the unconstitutionality of a statute which "conferred upon the City Commission virtually unbridled and absolute power to prohibit any parade, procession, or demonstration on the city's streets or public ways").

D. The FTC Admits the Absence of any Evidentiary Basis for the Fourth Circuit's Decision.

In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 414 (1993), this Court held: "It was the city's burden to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests." In this case, the FTC has utterly failed to establish the existence of any legitimate interest to be remedied, much less any "reasonable fit" between any such interest and its selective regulation of charities using professional fundraisers.

In the Opposition, the FTC admits its absence of empirical evidence supporting its selective regulation of charities using professional fundraisers. The FTC has previously used the absence of evidence of problems associated with charitable calls to justify the application of the national do-not-call registry to commercial speech. *See Mainstream Marketing Services, Inc.*, 358 F.3d at 1236-1237 (relying on the FTC's

evidence of the harassing effects of commercial speech, and the lack of similar evidence for charitable solicitations, to uphold the application of the national do-not-call registry to core commercial speech).

In the Opposition, the FTC broadly claims that "the TSR's application to telefunders directly and significantly furthers the protection of privacy and the prevention of fraud" and that "distinguishing between telefunders and in-house charity callers is entirely reasonable." *See* Opposition, p. 15.

The FTC has not identified the existence of any privacy invasions by charities using professional fundraisers, which might justify its regulations. Indeed, in 2004, the FTC declared "victory" over privacy intrusions, stating, among other things, that: "The Do Not Call Registry has made dinner time interruptions a thing of the past." *See* FTC website, press release dated June 24, 2004, entitled "National Do Not Call Celebrates One-Year Anniversary." In declaring its victory over the privacy intrusions associated with telemarketing, the FTC removed any possible rationalization—much less any "sufficiently strong, subordinating interest that the [government] is entitled to protect" (Opposition, p. 9)—for burdening the speech of charities using professional fundraisers.

Nor has the FTC identified the existence of any fraud that would be remedied by the selective regulation of calls by charities using professional fundraisers. The Supreme Court has repeatedly rejected any connection between the fact that a solicitor is paid for services and the likelihood that those services are fraudulent. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789-90 (1988), *Sec'y of State of Maryland v. Joseph H. Munson Co., Inc.*, 476 U.S. 947, 966-67 (1984), and *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636-37 (1980).

Having failed to offer any evidence of any legitimate interest served by its selective regulation of charities using professional fundraisers, the FTC urges the Court to ignore its absence of evidence and to defer to its "common-sense judgment that for-profit solicitors are more likely to engage in abusive or coercive telemarketing behavior because their compensation depends on the level of contributions they solicit." *See* Opposition, p. 13. However, there is nothing "common-sense" about the leap that the FTC urges the Court to make. It is equally plausible that committed volunteers of a charity are more likely to engage in coercive solicitation because of their personal emotional stake in the charity. It is also likely that the coerciveness of a telephone solicitor depends more on the individual solicitor's temperament than on whether they are being compensated for the call.

Thus, the FTC's suggestion that professional solicitors are more likely to engage in coercive solicitation is not a "common-sense judgment;" is it sheer speculation. As pointed out in the "Amicus Brief of Veterans First in Support of Petition for a Writ of Certiorari by National Federation of the Blind," p. 5-6, such rash speculation has never been permitted to justify restrictions on constitutional freedoms. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (holding that the government failed to carry its burden where it offered "anecdotal evidence" but "little hard evidence" and "no proof" justifying its regulation of speech). Because there is no demonstrable need for, or effect of, the FTC's regulation of the speech or charities using professional fundraisers, the regulations should be stricken.

E. The FTC Failed to Address the Equal Protection Argument.

The regulations at issue in this case violate the constitutional promise of equal protection. *See* "Amicus Brief of Veterans First in Support of Petition for a Writ of Certiorari

by National Federation of the Blind." In its Opposition, the FTC has failed to address the equal protection violations associated with the challenged regulations.

The FTC's argument in its Opposition that its jurisdictional limitations justifies its disparate treatment of charities using professional fundraisers flies in the face of the Fourteenth Amendment, as applied to the federal government under the Fifth Amendment. *See Adarand Constructors v. Pena*, 515 U.S. 200, 217 (1995). The Fourteenth Amendment expressly provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See United States Constitution, Fourteenth Amendment.

As discussed above, jurisdictional limitations, including the jurisdictional limitations of the FTC, are created by Acts of Congress. *See* Opposition, p. 2. Allowing Congress deny equal protection simply by making a law defining a federal agency's jurisdiction is exactly what is proscribed by the Fourteenth (and Fifth) Amendment, and is patently unconstitutional.

CONCLUSION

Based upon the foregoing, Petitioners respectfully request that the Court consider the Petition in this action concurrently with the Petition for a Writ of Certiorari in the *Fraternal Order of Police*, Case No. 05-1149 and grant both Petitions.

Respectfully submitted,

ERROL COPILEVITZ
Counsel of Record
WILLIAM RANEY
COPILEVITZ & CANTER, LLC
423 W. 8th Street
Suite 400
Kansas City, Missouri 64105
(816) 472-9000

Attorneys for Petitioners

May 5, 2006